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**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Docket Number (Optional)

42635-0200

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April 7, 2006

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Signature

Marc Fregoso

Typed or Printed Name

Application Number

10/757,116

Filed

01/14/2004

First Named Inventor

Karoleen B. Alexander

Art Unit

3643

Examiner

David J. Parsley

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest.  
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
(Form PTO/SB/96)

☒ attorney or agent of record.  
Registration number 25,726

☐ attorney or agent acting under 37 CFR 1.34.  
Registration number if acting under 37 CFR 1.34 \_\_\_\_\_

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April 7, 2006

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.  
Submit multiple forms if more than one signature is required, see below\*.

☐ \*Total of \_\_\_\_\_ forms are submitted.

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## PRE-APPEAL BRIEF REQUEST FOR REVIEW

### REMARKS IN SUPPORT

In the Final office action of February 10, 2006, the claims were rejected under 35 USC §103 on various combinations of Byrne (5,396,731), Tsao et al (5,678,353), Farley (5,730,773), Stella (9,882,386) and Schuurink et al (4,205,102). Byrne is the primary reference that supports all the rejections.

Claim 1, the only independent claim reads as follows:

1. (Currently Amended) A structure for use as a tree well skirt or sidewalk, comprising:

a base layer of rubber and a first binder; and

a wear layer of ethylene propylene diene monomer (EPDM) and a second binder on top of the base layer.

Byrne discloses a “mulch pad” having an upper surface 15 and a lower surface 16. The pad is made of rubber granules, buffings, and a binder.

The office action asserts that Byrne shows a base layer 16 (really the “lower surface” of pad 10, Col. 3, line 59), a wear layer, referring to Col. 5, lines 30, 31 (specifically mentions an antigloss agent), and a “binder on top of the base layer,” referring to 15 in Fig. 8 (really the “upper surface” of pad 10, Col. 3, lines 56, 57).

The office action has wrongfully construed Byrne’s pad 10 with an upper surface 15 and lower surface 16 as having a base layer, a wear layer and a “binder on top of the base layer.” The office action created three layers, where there is only one.

Applicant respectfully submits that this interpretation is clear error. That becomes obvious upon simply reading the Byrne specification.

The office action then goes to Tsao et al for a teaching of EPDM and adds the EPDM as a wear layer to Byrne's three layer pad.

Applicant spoke with Examiner Parsley after reviewing the Final Office Action and discussed the Examiner's interpretation of Claim 1.

The Examiner unequivocally stated that Claim 1 recites a base layer of rubber and a binder, a wear layer of EPDM and a third layer of "a second binder."

Applicant submits that the reading of Claim 1 is clear error. Claim 1 only recites two layers: a base layer made of rubber and a first binder, and a wear layer made of EPDM and a second binder, on top of the base layer.

None of the references, regardless of the combination, show such a structure.

Applicant called the Examiner's superior Peter Poon and left a message. The call was not returned.

Applicant respectfully submits that the office action's interpretation of Byrne contrary to its clear teaching and the reading of Claim 1 contrary to its plain meaning is clear error.